KA YIN CREDIT & LEASING SDN. BHD.

v.

PANG KIM CHA & BROTHERS DEVELOPMENT SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
MAHADEV SHANKAR J
[CIVIL SUIT NO. C23-1277-86]
28 MARCH 1988

CONTRACT: *Hire purchase agreement - Subject matter of agreement was a bulldozer - Bulldozer damaged in a fire - Pending claim against insurer - Express covenant for hirer to pay rent in any event - Hirer liable.*

This was an appeal against the decision of the Senior Assistant Registrar who had dismissed an application for summary judgment. The appellant/plaintiff had claimed damages for the repudiation of hire purchase agreement by the respondent/defendant.

The subject matter of the hire purchase agreement was a bulldozer. The respondent refused to pay the rent which were due under the agreement when the bulldozer was damaged in a fire pending a claim against the insurer of the said bulldozer. There was an express provision in the hire purchase agreement which provided that the liability of hirer to pay rent was not discharged notwithstanding the loss, destruction or damage of the bulldozer.

Held:
The respondent was liable to pay the rent under the hire purchase agreement notwithstanding the damage to the bulldozer as there was an express covenant which provided that the hirer would still be liable in the event of any loss, destruction or damage to the bulldozer.

[Appeal allowed.]

Case referred to:
Tiong Goon Toon v. Credit Leasing Corporation Sdn. Bhd. [1986] CLJ (Rep) 746

Other source referred to:
Hire Purchase Law & Practice by Goode (2nd. Edn.) p. 337

For the plaintiff - Leong; M/s. Shook Lin & Bok
For the 1st Defendant - T. Marbeck; M/s. Yusuf Lee Patma & Marbeck

JUDGMENT

Mahadev Shankar J:

On 9 February 1984 the 1st defendant (the company) took on hire purchase from the plaintiffs (Ka Yin) one bulldozer. The transaction was the subject of a formal Hire Purchase Agreement (the agreement). During the currency of the agreement the bulldozer was destroyed by fire. The defendants declined to pay any further instalments under the agreement until their claim against their insurers was first resolved. Ka Yin insisted on the instalments under the agreement being paid. When this did not happen they terminated the agreement and sued for the full balance due. The Senior Assistant Registrar refused to give the plaintiffs summary judgment. The plaintiffs appealed to me. I reversed the Registrar's dismissal and gave the plaintiffs judgment for the amount claimed. The company now appeals to the Supreme Court.

We are only concerned here with Ka Yin and the company. By the agreement the company contracted to pay thirty rent instalments of RM4,550 each commencing one month from 9 February 1984. By clause 4(e) of the agreement the company agreed to insure the bulldozer with an insurance company approved by Ka Yin under a fully comprehensive policy in Ka Yin's name as owner and the company's name as hirer for an amount equal to the full replacement value of the goods against fire and other risks. The policy was specifically required to contain a provision stating that any monies payable to the company under the policy shall be paid to Ka Yin. Under clause 4(f) of the agreement the insurance policy was required to be delivered to Ka Yin for retention.

The company accordingly took out an all-risks policy with Hong Leong Assurance Sdn. Bhd. (the insurers). The company is named as the insured in the policy but there was a hire purchase endorsement attached to the policy which presumably complied with the requirements of the agreement.

By January 1985 the company had paid only six instalments instead of ten. On 5 January 1985 there was a fire in which the bulldozer was completely destroyed. From that day onwards the company declined to pay any further instalments. On or about 24 January 1985 it received a copy of the insurance policy from Ka Yin who requested the company to keep them informed of the development of its insurance claims. The company say that Ka Yin instructed a firm of loss adjusters to look into the matter. On 13 February 1985 UMW (Malaya) Sdn. Bhd. quoted a sum of RM93,845.46 to repair the bulldozer. On 19 August 1985 the insurers by letter offered the company RM45,000 only as repair cost of the bulldozer in full and final settlement! The company wrote a strong letter to the insurers on 30 August 1985 protesting against this offer and reminding the insurers that the bulldozer was insured for RM150,000. They requested for a more realistic offer or alternatively called upon the insurers to repair the vehicle themselves. The insurers responded by letter on 11 September 1985 stating that they were unable to review their stand.

Presumably this is what led the company to file a Civil Suit No. 7723 of 1985 in the High Court at Kuala Lumpur against the insurers.

In the meantime the company was not making any payment of the instalments which fell due under the agreement. By an AR Registered letter through their solicitors dated 22 October 1985 Ka Yin gave formal notice to the company that they were treating the persistent defaults in the payment of rentals due under the agreement as a repudiation by the company of its obligations under the agreement and that Ka Yin was accepting this repudiation as terminating the agreement, whilst reserving Ka Yin's right to damages and other sums due. Without prejudice Ka Yin's solicitor requested for delivery up of the bulldozer and for arrears under the agreement with interest thereon and other charges. This demand was not complied with and Ka Yin filed this action on 12 May 1986. The method by which Ka Yin computed the balance of the amount due to be paid to it is set out in para. 9 of the statement of claim.

On 30 August 1986 the company filed a defence. This pleading is little more than a general denial which put the plaintiffs to strict proof of their entitlement to make the claim. So the plaintiffs immediately followed up with an O. 14 application.

I would here emphasise that nowhere in this defence have the company alleged that they were under no liability to meet this claim either because the agreement had been frustrated or because there was some legal liability on the part of the plaintiffs to stay proceedings until the insurance claim had first been resolved. Nevertheless even though the company solicitors had many months notice of the O. 14 application they bumped the plaintiffs'

solicitors with an affidavit which was affirmed on 17 March 1987 in which these defences were raised. The hearing, before the Registrar was on 19 March 1987. The fact that the Registrar dismissed the plaintiffs' application justifies an inference that he found that this contention on the part of the company raised a triable issue. It is to be noted from this affidavit that the first defendants were not quarreling with the computation of the amount of the claim. What they were insisting upon was that the insurance claim be first settled.

Clause 4(i) of the agreement was a complete answer to this submission. In material particular it reads:

> 4(i) Any insurance monies received shall first be applied in paying to the owner the unpaid balance of the hire purchase price and any other sums due from the hirer under the agreement with the hirer remaining liable to pay to the owner any deficit which may remain for the loss, destruction or damage in respect of which the insurance monies were paid. ... Subject as aforesaid the loss, ... destruction of or damage to the goods **shall not discharge the hirer's liability to pay all sums due under this agreement**."
> (Emphasis mine).

Counsel for the appellant submitted two authorities both of which were completely on point. In *Hire Purchase Law & Practice* by Goode (2nd. Edn.) p. 337 is the passage reading:

> Where complete or substantial performance of the agreement becomes impossible by reason of some act or event occurring subsequent to the formation of the agreement, the supervening impossibility will in certain circumstances automatically determine the agreement and discharge the parties from further liability thereunder. Thus **in the absence of any contractual provision bearing on the point,** this result will occur where the goods are accidently destroyed during the currency of the Hire Purchase Agreement without negligence on the part of the hirer or of any third party over whom the hirer can reasonably have been expected to exercise control. **But the terms of the agreement may be such as to indicate that destruction of the subject matter is not to be a frustrating event and that the hirers obligation to redeliver is absolute**.

The second authority was *Tiong Goon Toon v. Credit Leasing Corporation Sdn. Bhd.* [1986] CLJ (Rep) 746. There the appellant had taken a similar line. It was contended that the leasing agreements were "frustrated" because the machinery, the subject matter of the leasing agreements was destroyed by fire. But the agreements provided that,

> in the event of any loss or damage to the equipment ... this lease agreement shall continue to have full force and effect without any amendment and in particular the rent shall continue to be payable in full.

To my mind the effect of the agreement in this case is the same. Liability to pay the full rental continues despite damage or destruction.

Consequently there was no defence whatsoever to this claim.

I can readily appreciate the irritation of the first defendants of the manner in which they have been treated by their insurers. But there is nothing in the material before me to indicate that Ka Yin are in any way contaminated by that conduct and consequently they must be held entitle to receive their monies in accordance with the written agreement between them and the company.

Consequently the only decision in this case was to allow the plaintiffs' appeal with costs.

Also found at [1989] 1 CLJ 790